Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-9

AMERICAN FIDELITY FIRE INSURANCE COMPANY,

Petitioner,

vs.

SUE KLAU ENTERPRISES, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

The Decision of the District Court Was Not Final.

Respondent's brief in opposition to the petition for certiorari herein completely ignores the italicized words in the following crucial portions of the opinion and of the judgment of the District Court:

> "This case shall be dismissed *until the arbitration award is rendered.*" (Opinion, A19-A20).*
>
> "It is ORDERED AND ADJUDGED that this case be dismissed *until the arbitration award is rendered.*" (Judgment, A21).

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* All numerical references preceded by the letter "A" are to pages of the appendix to the petition herein.

Furthermore, respondent's brief (p. 8) sloughs off as "merely formalistic and surplusage" the statement, both in the opinion (A20) and in the judgment (A21), that "Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary."

It is a cardinal rule that statutes are to be construed, if at all possible, so as to give meaning and effect to every word and clause and not to treat any sentence, clause or word as superfluous. *Washington Market Company* v. *Hoffman,* 101 U.S. 112, 115-116 (1879); *Ex parte Public National Bank,* 278 U.S. 101, 105 (1928); *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932). The same rule applies to the construction of judgments. *Boundary County, Idaho* v. *Woldson,* 144 F.2d 17, 20 (CA9, 1944), cert. den. 324 U.S. 843 (1945); *Alegre* v. *Marine Motor Sales Corporation,* 228 F.2d 713, 715 (CA5, 1956); 49 C.J.S., Judgments, § 496, pp. 863-4.

Petitioner respectfully submits that respondent's arguments are thus premised on a faulty construction of the judgment of the District Court and are therefore unsound and that petitioner's construction (pet., p. 5) of the judgment is the proper one, consonant with the foregoing authorities.

Rogers v. *Schering Corporation,* 262 F.2d 180 (CA3, 1959), cert. den. *sub nom. Hexagon Laboratories, Inc.* v. *Rogers,* 359 U.S. 991 (1959), upon which respondent heavily relies (br., pp. 4, 5 and 7), is inapposite for a number of reasons:

(1) In the cited case, there was no reason to expect further litigation after the second arbitration award. Circuit Judge Maris said: "Certainly the award will not require judicial approval or a court decree to put it into effect" (262 F.2d at 182). This was because of a prior order compelling arbitration. In the instant case, there is

no such prior order and any new award by the architect would not be self-executing, but at a minimum an application for judgment on the new award would be required. Furthermore, Chief Judge Toledo in his opinion (A20) and the judgment (A21) expressly provide for further judicial proceedings after the second award. This contemplation of further proceedings was stated by Judge Maris as the touchstone of determining appealability of such orders: an order is not appealable if "in the normal course of judicial procedure" there will be a later order, but it is appealable if in such normal course it will not be followed by another adjudication, 262 F.2d at 182. Clearly, the instant order is in the former category.

(2) In the cited case, there was no unadjudicated pleading: the motion to confirm the award was denied and the motion to vacate was granted (262 F.2d at 181). In the instant case, the counterclaim is unadjudicated.

(3) In the cited case, the District Court refrained from directing a new arbitration, 262 F.2d at 181-182; in the instant case, Chief Judge Toledo said there was "sufficient cause . . . to remand this case so that a new hearing be held" (A19).

Accordingly, it is submitted that *Rogers* v. *Schering Corporation, supra,* does not support respondent's position.

II

The Existence of the Counterclaim Bars Appealability.

Respondent argues (br., pp. 9-11) that the architect's award constituted a complete defense of *res judicata* to petitioner's counterclaim and that, therefore, the existence of the counterclaim is no bar to the appealability of the District Court's decision. The *res judicata* defense goes to the merits of the counterclaim and has no bearing on appealability. More important is the fact that the District

Court vacated the award. A vacated or reversed judgment has no weight as *res judicata*. *De Nafo* v. *Finch*, 436 F.2d 737, 740 (CA3, 1971); *Simpson* v. *Motorist Mutual Insurance Company*, 494 F.2d 850, 854 (CA7, 1974), cert. den. *sub nom. Motorists Mutual Insurance Company* v. *Simpson*, 419 U.S. 901 (1974). No greater weight can be given to a vacated arbitration award. Appealability must be determined as of the time the appeal was taken and it is of no consequence, in determining appealability, that the award was subsequently reinstated by the Court of Appeals on an appeal of which it lacked jurisdiction.

Conclusion

The petition for certiorari should be granted, the judgment of the Court of Appeals should be vacated and remanded with instructions to dismiss respondent's appeal.

Respectfully submitted,

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